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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF
1996

Docket No. T-00000A-97-0238

AT&T AND TCG PHOENIX'S
BRIEF ON DARK FIBER
IMPASSE ISSUES

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") file their brief on the impasse issues relating to the terms and conditions of Qwest Corp.'s (formerly known as U S WEST Communications, Inc., hereinafter "Qwest") Statement of Generally Available Terms ("SGAT").

I. INTRODUCTION

The United States Congress conditioned Qwest's entrance into the in-region interLATA long distance market on Qwest's compliance with 47 U.S.C. § 271. To be in compliance with section 271, Qwest must "support its application with actual evidence demonstrating its *present* compliance with the statutory conditions for entry."¹

As AT&T has previously stated in its Comments in this proceeding, the

¹ Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, released December 22, 1999, ¶ 37 ("BANY Order").

Arizona Corporation Commission ("Commission") is charged with the important task of ensuring that Arizona's local telecommunications markets are open to competition and that Qwest is complying with its obligations under both the state and federal law. Although the Federal Communications Commission ("FCC") is the final decision-maker on Qwest's compliance with its section 271 obligations, the FCC looks to the state commissions for rigorous factual investigations upon which the FCC may base its conclusions.

To conduct a rigorous investigation, one must understand both the legal standards that Qwest is held to and investigate Qwest's actual implementation of those standards. Permitting Qwest to compete in the interLATA long distance market before it has fully and fairly complied with its obligations under section 271 will discourage, if not destroy, competition in both the local and long distance markets in Arizona.

Many a local competitor, including AT&T, has invested heavily in this State on the promise of open, fair competition in the local exchange market. AT&T requests that this Commission, through its rigorous investigation of Qwest's claims in this proceeding, ensure that the nascent local competitors realize that promise. To that end, AT&T respectfully submits this brief on the impasse issues relating to the provisions of Qwest's SGAT that address dark fiber.

Through workshops, the Commission is conducting its investigation of both Qwest's SGAT and Qwest's actual compliance, or lack thereof, with the checklist items contained in 47 U.S.C. § 271(c)(2)(B). With respect to the SGAT review, a "State commission may not approve such statement unless such statement complies with [section 252(d)] and [section 251] and the regulations thereunder." 47 U.S.C. § 252(f).

Furthermore, a state commission may establish or enforce other requirements of state law in its review of the SGAT. *Id.*

To demonstrate compliance with the requirements of section 271's competitive checklist, Qwest must show that "it has 'fully implemented the competitive checklist [item]... .'"² Thus, Qwest must plead, with appropriate supporting evidence, the facts necessary to demonstrate it has complied with the particular requirements of the checklist item under consideration.³ Qwest must prove each element by a preponderance of the evidence.⁴ Furthermore, the FCC has stated that the most probative evidence is commercial usage along with performance measures providing evidence of quality and timeliness of the performance under consideration. Finally, as with any application, the "ultimate burden of proof that its application satisfies all the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement[,]" rests upon Qwest.⁵

II. DISCUSSION

"Dark fiber" is deployed unlit fiber optic cable that connects two points within the incumbent LEC's network.⁶ In its *UNE Remand Order*, the FCC redefined the unbundled loop "to include all features, functions, and capabilities of the transmission facilities, *including dark fiber* and attached electronics (except those used for the provision of advanced services, such as DSLAMs) owned by the incumbent LEC, between an incumbent LEC's central office and the loop demarcation point at the

² *BANY Order*, ¶ 44.

³ *Id.*, ¶ 49.

⁴ *Id.*, ¶ 48.

⁵ *Id.*, ¶ 47.

⁶ *UNE Remand Order* at ¶325.

customer premises.”⁷ In addition, the FCC modified the definition of dedicated transport to include dark fiber.⁸ Thus, dark fiber is part of checklist item 2, network elements in general, item 4, unbundled loops and item 5, unbundled transport.⁹

The SGAT addresses dark fiber in Section 9.7. Through the workshop process, the parties, in large part, have reached agreement on the SGAT’s terms and conditions relating to dark fiber. The parties do, however, disagree on the following issues:

1. Whether Qwest Corp.’s affiliates, including its parent corporation affiliates are obligated to comply with the unbundling obligations of Sections 251 and 252 of the Act? (DF-1)
2. Whether Qwest is required to unbundle dark fiber that is included in a “joint build arrangement” that Qwest enters into with a third party? (DF-3)
3. Whether Qwest is required to provide CLECs with access to “dim fiber?” (DF-4)
4. Whether it is appropriate for Qwest to apply the FCC’s EEL restriction relating to special access services to unbundled dark fiber? (DF-5)
5. Whether Qwest’s technical publications relating to dark fiber have been updated to be consistent with its SGAT language? (DF-6)

As AT&T demonstrates below, Qwest does not comply with the Act and applicable FCC Orders with regard to several of these issues; therefore, the Commission should find that Qwest has failed to satisfy its Section 271 obligations. In failing to comply with its obligations to unbundle dark fiber, Qwest has failed to provide nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) (checklist item number 2). In addition, Qwest has failed to comply both with the local loop transmission requirements (checklist item number 4)

⁷ *UNE Remand Order* at ¶167 (emphasis added).

⁸ *UNE Remand Order* at ¶325.

⁹ 47 U.S.C §271(c)(2)(B).

and the local transport requirements (checklist item number 5) of the Act and the applicable FCC Orders.

A. The SGAT violates the Act because it fails to permit CLECs to lease the in-region facilities of Qwest Corp.'s affiliates pursuant to Sections 251 and 252 of the Act.

On June 30, 2000, the Commission approved the merger of Qwest Communications International, Inc. ("QCI") and U S WEST, Inc., ("U S WEST") the parent corporations of Qwest Communications Corporation ("QCC"), LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S WEST Communications, Inc., now known as Qwest Corp. ("USWC").¹⁰ In moving for approval of the merger, QCI and U S WEST represented to the Commission that the proposed merger would create a stronger competitor and provide significant value for shareholders, employees, and customers because, among other things:

- The combination of QCI and U S WEST would enable them to achieve gross revenue synergies of more than \$12 billion and net financial and operational synergies of approximately \$10.5 billion to \$11 billion. They expected the synergies to be comprised of (1) incremental revenues as the combined company expands its local, data, Internet Protocol and long-distance service; (2) operating cost savings in areas such as network operations and maintenance, sales and marketing, billing and customer and back office support; and (3) capital savings through elimination of duplication in the

¹⁰ In re the Matter of the Merger of the Parent Corporations of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc. and U S WEST Communications, Inc., Opinion and Order, Arizona Corporation Commission, Docket No. T-01051B-99-0497, Decision No. 62672 (June 30, 2000).

companies' planned network build outs and in other infrastructure and back-office areas.

- The combination would accelerate strategic development and enable them to grow faster than each could grow alone and would increase revenues and profits faster than each would accomplish alone. In particular, they expected it to accelerate the delivery of Internet-based broadband communications services provided by QCI to the large customer base of U S WEST and bring together complimentary assets, resources and expertise and the network infrastructure, applications, services and customer distribution channels of their companies and the combination of customer bases, assets, resources and expertise in a timely manner will permit each to compete more effectively in their rapidly consolidating industries.
- They believe worldwide broadband end-to-end infrastructure, expanded range of products and services, access to each other's customers, people and process and combined use of distribution and operating systems will create growth for the combined company and that, as a large company with global scale and scope, multiple capabilities, end-to-end broadband connectivity, and a full suite of data, voice and video products and services, they can successfully compete in the telecommunications industry in the long term.¹¹

In this docket, Qwest maintains that it has no obligation to unbundle the dark fiber facilities owned by the companies affiliated with Qwest, including its affiliated CLECs

¹¹ *Id.* at 4-6 and 27.

that are certified to provide local exchange services in Arizona. AT&T disagrees with this position. Under the Act, Qwest affiliates that have facilities in the Qwest region must make those facilities available on a resale basis to CLECs, consistent with sections 251 and 252.

Section 251(c)(3) obligates incumbent local exchange carriers ("ILECs") to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory. Section 252(d)(1) additionally requires ILEC rates for unbundled network elements to be based on cost, to be nondiscriminatory and to include a reasonable profit.

Section 251(h) defines an incumbent local exchange carrier as,

[W]ith respect to an area, the local exchange carrier that (A) on February 8, 1996, provided telephone exchange service in such area and (B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b)); or (ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

Qwest and its affiliates are "successors and assigns" of USWC and are therefore "ILECs" as defined by the Act.¹²

In the SBC/Merger docket, the FCC determined that under section 251(h), an entity may become an incumbent LEC by being a successor or assign of a LEC that, as of February 8, 1996, was providing local exchange service in a particular area and was a member of NECA, even if that entity was not itself providing local exchange service in the area or a member of NECA as of that date. The FCC held, "this interpretation of

¹² Although this issue is briefed specifically as an impasse issue with regard to Qwest's SGAT provisions relating to dark fiber, this argument applies to all SGAT provisions that Qwest intends to use to satisfy its ILEC obligations under the Act.

'successor and assign' is not only more consistent with the goals of section 251, but conforms more closely to the traditional notion of 'successor or assign.'"¹³ Thus, Qwest cannot legitimately argue that it is not a "successor or assign" because neither Qwest International nor its subsidiaries were providing local service in former USWC exchanges or were members of NECA on the date the Act was enacted.

Moreover, in approving the QCI/U S WEST merger, the FCC determined that QCI and its affiliates were "successors and assigns" as used in section 251(h) of the Act.¹⁴ In that proceeding, McLeodUSA asked the FCC to reject the merger application because, among other things, the merged entity "will have the ability to divert favored, high-volume customers to the affiliated [competitive] LEC, which can become the provider of new, innovative services, while the [incumbent] LEC's traditional local services are degraded and serve only residential users and other [competitive] LECs."¹⁵ McLeodUSA further argued that, after the merger, U S WEST will be able to use Qwest and its affiliates as competitive LECs "to attempt to avoid the [incumbent] LEC obligations under section 251(c)(4) of the Act to offer for resale, at wholesale rates, any services the [incumbent] LEC offers at retail." The FCC rejected McLeod's argument, reasoning,

Such an affiliate of U S WEST would be considered a "successor or assign" of U S WEST for the purposes of the obligations imposed by

¹³ In Re Applications of Ameritech Corp. and SBC Communications, Inc. for the Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, Memorandum Opinion and Order, CC Docket No. 98-141, FCC 99-279 (Released October 8, 1999)(SBC/Ameritech Merger Order) at ¶¶446-448.

¹⁴ In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Application for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order, CC Docket No. 99-272, FCC 00-91 (Released March 10, 2000) at ¶45.

¹⁵ *Id.* at note 131.

section 251(c)(4). Therefore, the competitive LEC hypothesized by McLeod would be treated as an incumbent LEC under section 251(c)(4).¹⁶

This conclusion is supported too, by the analysis of the United States Court of Appeals for the District of Columbia in a recent case involving an appeal of the SBC/Ameritech merger approval.¹⁷ There, the Court interpreted “successors and assigns” broadly to include affiliates of the ILEC that provide telecommunications services.

In *ASCENT*, the Court reviewed the FCC’s decision to permit the merged entity to offer advanced services through a separate affiliate and, by doing so, avoid section 251(c)’s duties. Although as mentioned above, in the U S WEST/QCI merger docket, the FCC matter of factly concluded that QCI and its affiliated CLECs would be successors and assigns of U S WEST for purposes of the Act, in the SBC/Ameritech merger, the FCC painstakingly concluded that although the Act extends an ILEC’s market-opening obligations to an ILEC’s “successor and assign,” the advanced services affiliate was not such a successor and assign so long as it complied with various structural and transactional safeguards.¹⁸ The D.C. Circuit rejected this analysis, finding that allowing an ILEC to “sideslip § 251(c)’s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme.” The Court further found that the FCC’s narrow interpretation of “successor and assign” in that context to be paradoxical:

[T]he Commission is using language designed by Congress as an added limitation on an ILEC’s ability to offer telecommunications services as a statutory device to ameliorate §251(c)’s restriction. We do not think that in the absence of the successor and assign limitation an ILEC would be permitted to circumvent §251(c)’s obligations merely by setting up an affiliate to offer telecommunications services. The Commission is thus

¹⁶ *Id.* at ¶45 (footnotes omitted).

¹⁷ *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

¹⁸ *Id.* at 665; SBC/Ameritech Merger Order at ¶¶444-476.

using the successor and assign limitation as a form of legal jujitsu to justify its relations of §251's restrictions.¹⁹

Although the *ASCENT* decision involved an advanced services affiliate of an ILEC, the reasoning of the D.C. Circuit in that case applies equally here. Interpreting the statute to *not* require QCI and its affiliates to be subject to the unbundling obligations of the Act would be to encourage the merged entity to "sideslip" §251's requirements by offering telecommunications services and investing in future network infrastructure through its wholly owned affiliates. In its merger application here in Arizona, QCI stated that it intended to combine the two corporations' assets, operations and network infrastructure and to plan build outs jointly to achieve synergies that would benefit the public interest and the merged entity's shareholders. This combined operation is a successor and assign of an ILEC, USWC.

For these reasons, the Commission should require Qwest to add language to its SGAT that clarifies that QCI and its affiliates are obligated to unbundled their in-region facilities, including dark fiber. This requirement is consistent with the goals of the Telecommunications Act and is necessary to prevent Qwest, through its affiliates, from usurping its obligations under section 251(c).

B. Qwest is required under the Act and the FCC Orders to allow CLECs to lease dark fiber that exists in "joint build arrangements" with third parties.

"Joint Build Arrangement" means any arrangement between Qwest and another party to jointly or separately construct, install and/or maintain conduit, innerduct or fiber across a single route or routes. This arrangement will permit either or both Qwest and the third party to use the other's conduit, innerduct or fiber for transport of telecommunications traffic over such route or routes. This type of arrangement includes,

¹⁹ *Id.* at 667.

among other things, meet point arrangements with third parties. Qwest has testified that it will make available dark fiber that exists in these arrangements up to Qwest's side of the meet point. However, it refuses to permit CLECs to obtain access to any rights that Qwest has to the use of the facilities of the third party. *See February 1, 2001 Transcript at 1395-98, 1409-23, 1498, and 1523-29.* AT&T disagrees with this position.

Section 251(c) and 47 C.F.R. §§51.307 and 309 require Qwest to provide nondiscriminatory access to unbundled network elements in Qwest's ownership or control. In addition, Qwest is obligated under §§251(b)(4) and 224 to afford CLECs nondiscriminatory access poles, ducts and rights of way. To the extent these joint build arrangements give Qwest control and/or provide Qwest a right of way on a third party's network, for the provision of Qwest's telecommunications services, Qwest must permit CLECs the same access to those rights of way. Without this access, CLECs are impaired in their ability to compete with Qwest in communities of the state where these joint build arrangements exist. In the rural areas in particular, CLECs may not even be able to reach particular communities that Qwest can reach through its joint build arrangement with a third party.

Checklist item number 3 in section 271 also addresses Qwest's rights of way obligations. Qwest must demonstrate that it is providing nondiscriminatory access to its poles, ducts and rights-of-way at just and reasonable rates, terms and conditions.²⁰ This checklist item is satisfied if Qwest has nondiscriminatory procedures for the evaluation of facilities requests by competitors, granting competitors nondiscriminatory access to

²⁰ BANY Order at ¶263.

information about its facilities; permitting competitors to use non-Qwest workers to complete site preparation; and compliance with applicable rates.²¹

Qwest's SGAT fails to include even the basic right of nondiscriminatory access to its control and/or rights-of-way that exist in joint build arrangements. AT&T has requested in discovery, samples of joint build arrangements that exist between Qwest and third parties in the state of Arizona. Qwest has testified that it has entered into such agreements in Arizona. *See February 1, 2001 Transcript at 1498.* Qwest recently objected to responding to this data request. A review of such arrangements would indicate the nature of Qwest's ownership or control over this network element. If such network element is in the nature of a right of way, Section 10.2 of the SGAT should be effective to provide access to CLEC. If such network element is in the nature of a leased facility, such as leased dark fiber, Section 9.7.1 should afford CLECs access to the facility. Alternatively, the agreements would indicate if such facility is some other arrangement—not a right of way or leased facility—over which Qwest has ownership or control. Without Qwest's willingness to complete the record on this issue, the Commission cannot determine whether Qwest is complying with its obligations under the Act. To the extent that those agreements provide Qwest rights to use the third party's facilities, including the dark fiber available on that particular route, Qwest must permit CLECs equal access to those facilities at just and reasonable rates and terms. Otherwise, Qwest fails its Section 271 obligations.

For these reasons, the Commission should require Qwest to include terms in its SGAT that allow CLECs nondiscriminatory access to Qwest's rights to use third party

²¹ Louisiana II Order at ¶¶174-83.

property consistent with those that Qwest enjoys in any joint build arrangement to which Qwest is a party.

C. Qwest should provide nondiscriminatory access to “dim fiber.”

“Dim fiber” is a term that has been used by the parties in this proceeding to refer to part of the spectrum of fiber that is not being used by Qwest. *February 1, 2001 Transcript at 1454-1457.* Qwest believes that it is not obligated to provide access to “dim fiber” and AT&T believes that it is. This issue is currently before the FCC for decision. The parties have agreed to incorporate the FCC’s decision on this issue into the SGAT. Therefore, if the FCC has not addressed the issue prior to the Commission’s issuance of its recommendation in this docket, no change to the SGAT is required. If, however, the FCC does decide the issue prior to the Commission’s recommendation, the SGAT should be changed accordingly.

D. Qwest impermissibly applies an EEL standard to unbundled dark fiber in Section 9.7.2.9.

In Section 9.7.2.9 of its SGAT, Qwest restricts the use of dark fiber by applying a test to the usage that was issued by the FCC with regard to Enhanced Extended Links (“EELs”). Qwest limits a CLEC’s use of dark fiber as a replacement of special access services. Not only is that test as applied to dark fiber impermissible under the language of the FCC UNE Remand Order and the FCC’s rules, but it is also technically infeasible. *See Discussion in February 1, 2001 Transcript at 1458-1461.* AT&T notes that Qwest applies this restriction to UNEs generally in Section 9.1.3, and believes that it is equally impermissible there.

WorldCom in its brief on the dark fiber impasse issues demonstrates how the FCC Orders do not support Qwest's position on this issue. *See WorldCom's Brief Addressing Dark Fiber Impasse Issues at 1-4.* AT&T concurs with the argument set forth by WorldCom and joins in WorldCom's recommendation that the Commission delete that section of the SGAT. In addition, §51.309(b) explicitly provides:

A telecommunications carrier purchasing access to an unbundled network element may use such network element to provide exchange access services to itself in order to provide interexchange services to subscribers.

For these reasons, AT&T concurs with WorldCom's recommendation that the Commission delete this section of the SGAT.

The second reason that the Commission should delete that section of the SGAT is that technically, the test set forth in Section 9.7.2.9 is not possible to apply to unbundled dark fiber. The FCC developed a test for the EEL, that is reflected in this section of Qwest's SGAT, to determine how much of the EEL was to be used for local traffic. The test is designed to apply to a single end user. Dark fiber, however, is typically used for multiple end users. *See February 1, 2001 Transcript at 1458 and 1459.* When AT&T asked Qwest during the workshop to explain how the test could apply to multiple end users, Qwest did not respond. *Id. at 1459-1461.* AT&T believes that Qwest could not provide a cogent answer to this question even if it had been willing to do so: The FCC's test cannot be applied to dark fiber and, by implicating such test, Qwest's language is nonsensical.

For these reasons, Section 9.7.2.9 should be stricken. By applying this test to unbundled dark fiber, Qwest impermissibly restricts CLEC access to dark fiber in contravention of the Act and the FCC's UNE Remand Order.

E. Qwest promised to update Technical Publication 77383 to be consistent with the commitments Qwest has made in its current SGAT language regarding dark fiber.

At Section 9.7.2.18, Qwest incorporates by reference its Technical Publication 77383. When AT&T reviewed that technical publication, it determined that its terms were inconsistent with the commitments that Qwest has made in its SGAT language relating to dark fiber. *See February 1, 2001 Transcript at 1471-1472.* For instance, the technical publication does not allow CLECs to lease dark fiber between the Qwest wire center and a CLEC wire center, does not allow for direct connection and does not allow CLECs to lease single fibers. *Id.*

In response to these concerns, Qwest testified that it will update its technical publications to ensure its consistency with its commitments in its SGAT. *Id. at 1472-1473.* In addition, Qwest introduced language to be added to its SGAT that provides that the SGAT supercedes any other inconsistent document, including Qwest's technical publications. *See 3 Qwest 23 and February 2, 2001 Transcript at 1534-1536.* Qwest committed to provide a draft of modifications to Technical Publication 77383 to make it consistent with the SGAT within 30 days of the workshop. To the extent that Qwest has failed to submit conforming language in its Technical Publication or to the extent it is not consistent with the commitments Qwest has made in its SGAT, the Commission should find that Qwest has failed to satisfy its Section 271 obligations with regard to dark fiber. If Qwest's internal documentation that directs its employees in their interaction with CLECs is inconsistent with the Act and the FCC Orders, Qwest cannot satisfy its

checklist obligations, regardless of the language of the SGAT. Mere "paper promises" are insufficient to enable Qwest to obtain section 271 approval.²²

III. CONCLUSION

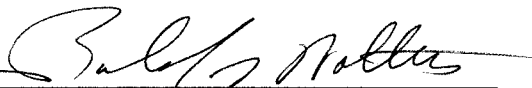
If Qwest's SGAT language is not modified to correct the problems outlined in this brief, for the reasons stated, this Commission should find that Qwest has failed to comply with its obligations to provide nondiscriminatory access to unbundled dark fiber under checklist items 2, 4 and 5 of Section 271 of the Act.

Dated this 8th day of March 2001.

Respectfully Submitted,

**AT&T COMMUNICATIONS OF THE
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²² DOJ SC Evaluation at ¶13; DOJ La. I Evaluation at ¶¶9 and 14.

CERTIFICATE OF SERVICE

I certify that the original and 10 copies of AT&T and TCG Phoenix's Brief on Dark Fiber Impasse Issues in Docket No. T-00000A-97-0238 were sent by overnight delivery on March 8, 2001 to:

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A handwritten signature in black ink, appearing to read "Penny Bewick", is positioned above a horizontal line.
